

DOCKET FILE 93-292 ORIGINAL

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D. C.

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JAN 14 1994

In the Matter of )  
Policies and Rules )  
concerning Toll Fraud )

CC Docket No. 93-292

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

TO: The Commission

COMMENTS OF COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby comments in response to the Notice of Proposed Rulemaking (FCC 93-496) [hereinafter "Notice"] released on December 2, 1993 in the above-captioned proceeding. CompTel is the principal industry association of the nation's competitive interexchange telecommunications carriers, with approximately 140 member companies, including large nationwide interexchange carriers ("IXCs") and scores of smaller regional carriers.

CompTel agrees with the Notice that toll fraud is a serious nation-wide problem which should be addressed at the federal level in a systematic and comprehensive way. CompTel urges the Commission to focus its efforts on the prevention and detection of toll fraud, not the re-allocation of liability for toll fraud among carriers and end users. To that end, CompTel supports establishing a new Federal Advisory Committee if the Commission believes that such a Committee would work well with existing industry organizations to broaden consumer education initiatives and strengthen law enforcement tools. See Notice at ¶ 13. In general, cooperative efforts among all interested parties

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and Government agencies are a far preferable way of combatting toll fraud than creating destructive internecine conflicts through new rules re-allocating liability broadly within the industry.

With respect to PBX fraud, liability should remain with the end-user customers because they have sole responsibility for choosing, and sole control over, the PBX equipment. Customers select which PBX to purchase, and they have exclusive control over the PBX equipment; the activation or disabling of the DISA feature; the length of authorization codes; the use of the PBX to monitor traffic; the use of the PBX to block calls to specific locations or at specific times; and numerous other PBX security features. PBX owners are in the best position to minimize or prevent toll fraud and, therefore, liability for toll fraud should remain with PBX owners to ensure that they have maximum incentives to take all prudent measures necessary to protect PBX security. To off-load liability onto the backs of IXC's which lack control over PBX security would harm the public interest by imposing massive financial exposure upon IXC's for decisions and events beyond their control. Small IXC's could face aggregate exposure for toll fraud liability that far exceeds their revenues. In these circumstances, "spreading" liability among IXC's would destabilize the industry without promoting the detection and prevention of PBX fraud.

Moreover, it would lead to an inefficient allocation of resources if IXC's are forced to accept any portion of the liability for PBX fraud. IXC's would have to recover such costs from their entire customer base, effectively forcing all telephone

subscribers -- including non-PBX subscribers as well as PBX owners which have established secure PBXs -- to insure PBX owners which are vulnerable to toll fraud. This would be a classic cross-subsidy, whereby the cost-causative party would escape responsibility for some or all of the costs it has caused through its decision to use a PBX, its choice of a PBX, and the security measures it does or does not implement for the PBX. There is no reason to remove from PBX owners the responsibility to acquire sufficient insurance for their PBX operations or, if they so choose, to make the business decision to forego insurance altogether.

Any system of "comparative" liability for PBX fraud would be an administrative and litigious nightmare by requiring ad hoc, case-by-case adjudication. Such a system would only aggravate the toll fraud problem by channelling scarce private and public resources into litigation or dispute resolution without providing any meaningful additional incentives for PBX fraud prevention. Further, comparative liability would invite abuse by customers who claim "fraud" in a desire to avoid payment of charges lawfully incurred. Moreover, the concept of comparative liability does not apply to IXCs, which do not control the PBX and are not responsible for toll fraud vulnerability.

CompTel disagrees with the notion that liability can inevitably be assessed in individual cases on the basis of comparative fault or negligence. There is a broad continuum of measures which a PBX owner can take to prevent or minimize the likelihood of toll fraud. It is a business decision for each PBX

owner to decide which measures are most appropriate in its own circumstances. That a PBX owner ultimately is a victim of toll fraud does not mean that the owner, or anyone else, made the wrong decision or was otherwise negligent or at fault. Like all insurance, PBX security is an exercise in probabilities rather than certainties. Because toll fraud may occur in circumstances where no party is to blame, it makes no sense to establish a system of comparative liability or to remove liability from the PBX owner who is responsible for making the decisions about how much and what kinds of toll fraud "insurance" it should obtain.

The Commission cannot reasonably impose any PBX fraud liability upon IXCs without giving IXCs the rights necessary to manage their risks prudently. If IXCs might bear some or all liability, they must be able to participate equally with the end-user customer in all decisions about which PBX the customer purchases, whether the DISA feature should be activated or disabled, and what other security measures the customer should implement to protect the PBX against toll fraud. Of course, IXCs should have the right to refuse to provide service to high-risk PBX owners. Put in other words, the Commission cannot reasonably force IXCs to act as insurance companies for PBX owners without authorizing IXCs to manage their risks in the same manner as insurance companies. However, CompTel submits that creating a regime of IXC rights over PBX decisions would be unwieldy and inevitably would lead to needlessly higher costs for all parties. Rather than create such a complex and expensive insurance system

within the IXC industry, the Commission should reject any proposal to establish a system of comparative liability for PBX fraud.

The Notice (at ¶ 24) proposes to require carriers to warn customers of the risk of toll fraud. CompTel believes this requirement is unnecessary. Most IXCs now warn their customers of this risk; the Commission itself has publicized this risk and there is "widespread public awareness of the potential problem." See Petition for Declaratory Ruling of Pacific Mutual Insurance Company, ENF-91-07, at page 3. The future efforts proposed in the Notice, including the Federal Advisory Committee, will ensure that all subscribers are fully informed about toll fraud risk. Indeed, because it is a customer's purchase of a PBX that creates the most significant risk of toll fraud, it should be PBX manufacturers which provide the warning. Imposing a warning requirement upon carriers will only lead to pointless litigation after toll fraud has already occurred about whether a particular warning was sufficient. At a minimum, the Commission should spell out all details (e.g., content, timing and frequency) of any warning requirement it imposes upon IXCs.

The Notice also asked for comment (at ¶ 26) on whether the Commission should require carriers to offer fraud prevention services. CompTel strongly opposes any such requirement. As the Commission has recognized (see Notice at ¶ 26), many IXCs have moved quickly to develop and offer such services in response to customer demand. Moreover, those services are in addition to PBX-based monitoring services, which CompTel believes are the most effective and reliable ways of preventing toll fraud and which PBX

owners can obtain independently from IXC offerings. Because market forces are fully capable of satisfying customer demand for monitoring and detection services, there is no need to require all IXCs to offer such services. Further, such a requirement would be onerous for smaller carriers, particularly those which rely in whole or in part upon the networks of multiple facilities-based carriers for the services they provide to end users.

Of course, market forces will not lead to new IXC monitoring and detection services which would cost more than PBX owners are willing to pay. In that case, there is no public interest in requiring IXCs to offer such services. Like any other insurance product, IXC detection and monitoring services should not be mandatory if PBX owners feel the costs are greater than the benefits. PBX owners are in the best position to determine which insurance products and services are cost-effective, and the Commission should not order IXCs to provide services which the market does not develop.

With respect to payphone fraud, CompTel believes that a system of comparative liability would be just as expensive, unwieldy, and inappropriate as for PBX toll fraud. At a minimum, the Commission should recognize that there is only one way in which an IXC could possibly be at "fault" -- namely, by failing to honor originating line screening ("OLS") or billed number screening ("BNS") restrictions which have been ordered by the payphone provider and which have been forwarded to the IXC. Further, there are numerous measures which payphone operators can implement to reduce toll fraud risk apart from OLS and BNS

restrictions. As a result, any inadvertent failure by an IXC to honor OLS or BNS restrictions should not result in liability if the payphone operator unreasonably fails to avail itself of other measures for protection against toll fraud.

Lastly, with respect to liability for line information database ("LIDB") fraud, CompTel is aware that local exchange carriers have entered into Mutual Honoring Agreements ("MHAs") with AT&T. As CompTel has previously informed the Commission, LECs assume more of the liability under the MHAs than they do for other IXCs under the terms of their LIDB tariffs. See "Comments on Direct Cases," CC Docket No. 92-24, filed by CompTel on June 5, 1992. The Commission has emphasized that such discrimination is unlawful:

"Of course, since Section 202(a) of the Communications Act prohibits unjust or unreasonable discrimination by any means or device, a mutual honoring agreement that creates an unreasonable preference favoring one IXC with respect to a LEC's liability for erroneous information in its database, in comparison to liability provisions contained in LEC access tariffs, would violate the Communications Act." Local Exchange Carrier Line Information Database, 8 FCC Rcd 7130, 7136 (1993).

Whatever rules or policies the Commission adopts with respect to liability for LIDB fraud, the Commission must ensure that local exchange carriers cannot discriminate against small IXCs, thereby

selectively altering their assumption of liability, through the MHAs they negotiate with AT&T or a few large IXC's.

Respectfully submitted,

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January 14, 1994

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